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Constitutional authoritarianism, not authoritarian constitutionalism!

A Constitutionalist View

KONRAD LACHMAYER — 31 August, 2017



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In these times of re-emerging illiberalism, populism and authoritarianism, there is an increasing need for us to attempt to find new academic concepts to describe the phenomena that are emerging. These efforts can also help to redefine existing forms of constitutional developments. One increasingly common term used is *authoritarian constitutionalism*, which seems to fit into the debates of the last decades like *global constitutionalism* or *international constitutionalism*, and appears to describe new developments in constitutionalism.

I am, however, deeply convinced that the use of the term *authoritarian constitutionalism* in an academic or public debate is misleading, conceptually wrong and politically dangerous. It is therefore necessary to respond to an attempt to conceptualise *authoritarian constitutionalism*, as recently suggested by Roberto Niembro in a post on [Völkerrechtsblog](#) (see also Niembro, 2016 *Verfassung und Recht in*

Übersee 339-367).

Niembro defines *authoritarian constitutionalism* as “a concept that refers to a very sophisticated way in which ruling elites with an authoritarian mentality exercise power in not fully democratic states. In this case, the regime’s liberal democratic constitution, instead of limiting the power of the state and empowering those who would otherwise be powerless, is used for practical and authoritarian ideological functions.”

Although Niembro concedes, that there is a contradiction contained within the concept (“At first glance, authoritarian constitutionalism appears absurd and nonsensical.”), he justifies the concept as “a perplexing category, but not absurd”. He argues that it “emphasizes the tension between the exercise of power within ill-defined limits, lack of accountability, and how the ruling elite executes and masks its violence under the forms of the constitution, and the idea of constitutionalism.” Ultimately, he wants to establish this concept “not to hide or justify these authoritarian functions”, but to use it as “a tool that helps us understand, uncover, and critique those functions. In this sense, authoritarian constitutionalism is normatively attractive as a critical tool.”

As his post and his article make clear, Niembro is not disputing the classic concept of constitutionalism, which serves the ideas and ideals of a liberal democracy, the rule of law and the protection of human rights. Constitutionalism as a concept is therefore a liberal ideology, a political program and a normative concept. Authoritarianism is very much the opposite of the concept of constitutionalism, arguing in favour of illiberalism, limiting democracy, extending the power of the government, rule by law and restricting the rights of individuals.

Niembro develops a concept of *authoritarian constitutionalism* that primarily describes how authoritarianism is spreading in constitutional legal systems. Upon close inspection of his argument, namely, that he wants to conceptualise these developments, it becomes apparent that these developments do not fit into the normative concept of constitutionalism. On the contrary, these tendencies oppose the ideas of constitutionalism. It is not sufficient to point out paradoxes to

overcome the contradictory nature of the two normative concepts.

Niembro does not distinguish between the different layers. Constitutionalism is a normative concept which summarizes the core ideas of a liberal democracy, while the developments which can be summed up as *authoritarian constitutionalism* are factual ways of dealing with constitutional law in (semi-)authoritarian regimes. When it comes to conceptualising these developments, it becomes clear that the concept is not one of authoritarian constitutionalism (which would mean constitutionalism no longer taking itself seriously) but much rather of constitutional authoritarianism. Constitutional authoritarianism is a conceptual category of authoritarianism, which uses constitutional law (not the normative concept of constitutionalism) to stabilize governments politically and which misuses and distorts certain constitutional institutions (without giving them full powers). It creates the semblance of constitutionalism while undermining the concept.

As a preliminary conclusion it must be stated, that constitutional authoritarianism and *authoritarian constitutionalism* are not very similar. While the first reveals the authoritarian ways of using constitutional law for its own purposes, the latter is a contradiction of the concept.

It is important to point out, that in liberal democracies the ideas of constitutionalism are never 100% realised. However, acting in accordance with the values of constitutionalism is not only mentioned in the constitutions of liberal democracies, but is also a leading principle for the overall legal and political culture. Although politicians, groups and individuals might try to change the overall setting, the conceptual perspective is clear. Developments of a constitutionally authoritarian nature are never geared towards the ideals of constitutionalism. On the contrary, they stabilise certain authoritarian approaches.

It is also necessary to distinguish between authoritarian constitutions and *authoritarian constitutionalism*. While concrete constitutions can neglect the ideas of constitutionalism and provide authoritarian provisions, interpretation or institutions, this does not mean that the

normative concept of constitutionalism is realised by these authoritarian constitutions. Finally, authoritarian regimes might be masked by an uncontroversial constitutional text, which resembles those of liberal democracies, but has no relevance in the legal culture of the country at all.

Obviously, a concrete constitutional system or the different actors in a constitutional system can lead to different normative concepts when it comes to different constitutional questions. Certain legal systems might promote the rule of law (e.g. independent courts), but still do not guarantee democratic elections or civil participation. It is, however, still important to distinguish the different developments in any particular legal system from the conceptual level. Thus, a constitutional system can head in different conceptual directions at the same time. Niembro suggests that his concept serves a critical function, but the important goal of critical analysis can be realised much better by not using the term “authoritarian constitutionalism”. A critical constitutional theory fits perfectly into the concept of traditional constitutionalism and can show how elites hold authoritarian practices and use authoritarian practices.

It should have become clear, that all developments that are circumscribed by the phenomenon of *authoritarian constitutionalism* (examples from Niembro: ill-defined limits, lack of accountability, execution and concealment of violence by the ruling elite) belong to the conceptual category of “authoritarianism” and not to the category of “constitutionalism”. Insofar as constitutional law is used to pursue these authoritarian ideas, it is plausible to use the term *constitutional authoritarianism*.

But why is it so necessary to distinguish between *authoritarian constitutionalism* and *constitutional authoritarianism*? Besides the importance of terminological clarity in a constitutional discourse, I have already attempted to illustrate why the idea of *authoritarian constitutionalism* is conceptually wrong. “Authoritarian” is not a characteristic of constitutionalism. Constitutionalism is also not a characteristic of authoritarianism, but authoritarianism can be constitutional, in the sense, that it applies the strategy of (mis-)using constitutional law to pursue authoritarian ideas. Although

authoritarian developments in Eastern Europe cannot be compared to the constitutional dilemmas faced by states in Latin America for decades, this does not change the conceptual problem of *authoritarian constitutionalism*.

A concept of *authoritarian constitutionalism* is also misleading, because it creates the possibility for constitutionalism to be understood as authoritarian. Thus, the term does not only fail to help clarifying current developments, but is unfortunately also confusing the constitutional discourse, in academia as well as in the public domain. It is at this point, that the term *authoritarian constitutionalism* becomes politically dangerous. It enables authoritarian governments to claim that their approach of *authoritarian constitutionalism* is at least an approach of constitutionalism. This issue has become even more important, because nowadays terminology and concepts are rhetorically used to address the opposite of their real meaning (in a 21st century version of Orwell's Newspeak).

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